Supreme Court, U.S.
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No. 02-02

In The
Supreme Court Of The United States

October Term, 2001

STATE OF CONNECTICUT,

Petitioner,

v.

PHYSICIANS HEALTH SERVICES OF CONNECTICUT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE DECISION IN *BLUMENTHAL V. BARNES* IS INAPPLICABLE TO THE PRESENT CASE.

The majority of the arguments raised by PHS in its Opposition were anticipated in Connecticut's original brief, and our presentation will not be repeated here. However, PHS raises two new issues that require a brief response.

On August 20, 2002 the Connecticut Supreme Court issued a decision in *Blumenthal v. Barnes*, 2002 Conn. LEXIS 327 ("Barnes"). The issue before the court was whether the Attorney General has standing under common law to bring an action in his own name for breach of fiduciary duties by officers of a not-for-profit organization in order to remedy the misappropriation of the organization's noncharitable receipts. *Id.* at 10. The Connecticut Supreme Court held that he does not.

A. Unlike Barnes, Which Explored the Attorney General's Common Law Authority, In This Case The Attorney General Invokes Only His *Statutory* Power to Represent the State.

The decision of the Supreme Court in *Blumenthal v. Barnes* addressed the scope of the Connecticut Attorney General's authority to bring an action under his own name under the common law against a public charity for the misappropriation of the organization's non-charitable assets. This action is brought by the State of Connecticut in its own name, as *parens patriae* for the citizens of Connecticut. Thus, *Barnes* is inapposite and does not apply here. Moreover, the Connecticut Attorney General's participation in his case is specifically authorized by Conn. Gen. Stat. § 3-125.

The statutory authority for the Connecticut Attorney General is found at Connecticut General Statutes § 3-125. [1]

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[1] Connecticut General Statute § 3-125 provides in relevant part: "The Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state, the Governor, the Lieutenant Governor, the Secretary, the Treasurer and the Comptroller, and for all heads of departments and state boards, commissioners, agents, inspectors, committees, auditors, chemists, directors, harbor masters and institutions and for the State Librarian in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the state is a party or is interested, or in which the official acts and doings of said officers are called in question, and for all members of the State House of Representatives and the State Senate in all suits and other civil proceedings brought against them involving their official acts and doings in the discharge of their duties as legislators, in any court or other tribunal, as the duties of his office require; and all such suits shall be conducted by him or under his direction. When any measure affecting the State Treasury is pending before any Commissioner of the General Assembly, such committee shall give him reasonable notice of the pendency of such measure, and he shall appear and take such action as he deems to be in the best interest of the state, and he shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. All legal services required by such officers and boards in matters relating to their official duties shall be performed by the Attorney General or under his direction. All writs, summonses or other processes served upon such officers and legislators shall, forthwith, be transmitted by them to the Attorney General. All suits or other proceedings by such officers shall be brought by the Attorney General or under his direction. He shall, when required by either house of the General Assembly or when requested by the president pro tempore of the Senate, the speaker of the House of Representatives, or the majority leader or the minority leader of the Senate or House of Representatives, give his opinion upon questions of law submitted to him by either of said Houses or any of said leaders. He shall advise or give his opinion to the head of any executive department or any state board or commission upon any question of law submitted to him. He may procure such assistance as he may require. Whenever a trustee, under the provisions of any charitable trust described in Section 45a-514 is required by statute to give a bond for the performance of his duties as trustee, the Attorney General may cause a petition to be lodged with the probate court of the district in which such trust property is situated, or where any of the trustees

The statute provides that "[t]he Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction. He shall appear for the state . . . in all suits and other civil proceedings . . . in which the state is a party or is interested. . . ." Thus the statute grants the Attorney General authority to appear in all cases in which the state is "interested." That is precisely the posture here.

B. Only The Attorney General Can Assert Connecticut's Interest as Assignee of Enrollees.

The assignments executed by the eight enrollee-assignors in this case specify that the powers assigned are to be exercised by the Attorney General: "By this assignment I intend to empower the State of Connecticut, by and through the Attorney General, to take action to protect me and people like me, pursuant to 29 U.S.C. 1132(a)(3). . . ." Petitioner's Appendix at A8. Thus by their own terms the assignments foreclose the exercise of the assigned powers to state's attorneys or any other state officers other than the Attorney General. Since status as assignee is not available to state's attorneys, the Attorney General may assert the assigned interest under the authority granted by Connecticut General Statute § 3-125 giving him power to represent the state in all matters in which the state is "interested."

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reside, for the fixing, accepting and approving of a bond to the state, conditioned for the proper discharge of the duties of such trust, which bond shall be filed in the office of such probate court. The Attorney General shall prepare a topical and chronological cross-index of all legal opinions issued by the Office of the Attorney General and shall, from time to time, update the same." (emphasis added).

II. THE ASSIGNMENTS IN THIS CASE ARE VALID.

In its brief, PHS argues that the assignments in this case are "invalid" because "they are 'partial assignments' and impermissibly 'split claims.'" *Opposition* at 10. PHS cites The Restatement (Second) of Judgments, § 24, Comment F for the proposition that "[I]t is fair to hold that after judgment for or against the plaintiff the claim is ordinarily exhausted so that the plaintiff is precluded from seeking any other remedies deriving from the same grouping of facts." *Id* at 10-11.

Plaintiffs' argument fails for three reasons. First, even assuming, *arguendo*, that the claim for benefits of an enrollee-assignor would be barred if brought after the entry of judgment in the present case, that does not mean that the assignments themselves are in any way "invalid."

Second, seven of the eight enrollee-assignors have no claim for benefits they could, even theoretically, appeal or assign. These seven[2] could not afford to purchase the medicine that had been prescribed for them. JA A46-67. Because they did not pay out-of-pocket they incurred no expense for which they could seek reimbursement. Only assignor Ann Zeisler was able to purchase the prescription drug she needed; Ms. Zeisler paid $1220 of her own money to obtain medicine to treat her migraine headaches. JA A54-55.

Finally, applicable case law provides that post-judgment claims for money damages are not barred where the initial class action litigation seeks only declaratory and injunctive relief:

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[2] Guy Simone, Myra Doughney, Antonio Aresco, Arthur Judson, Rose Shefcyk, Richard Seastrand, and Kelly Jacek.

> The general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events. In fact, "every federal court of appeals that has considered the question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for damages." *In re Jackson Lockdown/MCO Cases*, 568 F.Supp. 869, 892 (Ed. Mich. 1983): See, e.g., *Fortner v. Thomas*, 983 F.2d 1024, 1030-32 (11th Cir. 1993)("it is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action."); *Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction* § 4455 (1981 & 1995 Supp.) (collecting cases).

Timothy Hiser v. Richard Franklin, et al., 94 F.3d 1287, 1291 (9th Cir. 1996).

In the present class action case as well, the plaintiff seeks only injunctive relief; individual enrollees would therefore be permitted to bring separate suits for benefits denied, even after judgment in this case has been entered.

CONCLUSION

In its opposition PHS has sought to cloud the issues and distract this Court from the fact that the Court of Appeals, by denying Connecticut *parens patriae* standing without identifying a clear statement of congressional intent, and by refusing to acknowledge the reality of Connecticut's Article III "injury in fact," has failed to

recognize the constitutional dimensions of Connecticut's sovereign interest in the health and welfare of its citizens.

For all of the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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